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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 83-6527

FREDERICK KIRKPATRICK

PETITIONER

VERSUS

STATE OF LOUISIANA

RESPONDENT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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STATE'S RESPONSE IN OPPOSITION TO
"FACTS MATERIAL TO QUESTIONS PRESENTED"

The applicant contends that the trial court erred in refusing to respond to certain questions asked by the jurors during their deliberations. The pertinent portion of the oral transcript is as follows at pages 43 through 45 of Volume IV, which is as follows:

> BY THE COURT:
>
> Ladies and gentlemen, the bailiff has presented me with a note from you, which I will read into the record. It says, "According to the law, does life mean until natural death, or does it mean a predetermined number of years?" According to Louisiana law, the only factors that you can take into consideration in making a determination as to the sentence to be imposed in this case are the statutory aggravating circumstances and the mitigating circumstances that are involved in this case and nothing else. It is based strictly on those factors that you make your recommendation.
>
> I would again indicate to you that your recommendation must be unanimous, if you can either recommend unanimously the death penalty or life imprisonment. In the event you cannot unanimously agree to recommend the imposition of the death penalty or the imposition of life imprisonment without benefit of probation, parole, or suspension of sentence, then you should let

me know and the court shall impose a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence.

From the above transcript, it can be seen that the judge answered the jury's note.

The defense counsel at page 44 asked about another jury question, and the court replied at page 45, as follows:

> BY THE COURT:
> Gentlemen, before we bring in the jury, I found the other note that the jury brought back with the verdict in the guilt or innocence phase of the trial. The note reads, Question One, "Life sentence, can there be parole?" Two, "Can the present law be changed in regards to the above?" Court will order that this note be filed in the record.

It should be noted that there are no objections in the record concerning the court's response to either of the jury questions. The judge had already answered the question, "Life sentence, can there be parole?", at page 223 of Volume III. On page 223 as well as in the answer set forth above, the judge is instructing the jury and states that life imprisonment was without benefit of parole.

On appeal to the Louisiana Supreme Court[1], the applicant contended that the trial court erred in refusing to explain to the jurors the meaning of "life imprisonment" under the penalty clause for the first degree murder statute [2], and in refusing to answer the jury's questions regarding the status of the law. The Louisiana Supreme Court correctly found that the record based on the above quoted transcript shows that during the sentencing deliberations and in response to the jury's notes, the trial judge brought the jury

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1 See State v. Kirkpatrick, 443 So.2d 546 (1983), at page 558.

2 Louisiana Revised Statute 14:30.

before the court and readvised them of the factors which they could take into account in deciding the sentence. The Louisiana Supreme Court decided as follows at page 559, as to this issue:

> "It is well settled that an instruction or comment to the jury making mention of commutation or parole possibilities on a life sentence in a capital case introduces arbitrary factors which divert the jury from their primary responsibility. Therefore, such instructions or comments are improper. State v. Brown, 414 So.2d 689 (La. 1982); State v. Willie, 410 So.2d 1019 (La. 1982); State v. Lindsey, 404 So.2d 466 (La. 1981).
>
> In California v. Ramos, -- U.S. --, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), the United States Supreme Court, citing State v. Lindsey, supra, conceded that many states including Louisiana ' ... have held it improper for the jury to consider or to be informed -- through argument or instruction -- of the possibility of commutation, pardon, or parole.' Id., -- U.S. at -- n. 30, 103 S.Ct. at 3459 n. 30. The opinion further notes that '[i]t is elementary that States are free to provide greater protections in their criminal justice system, than the Federal Constitution requires.' Id. -- U.S. at --, 103 S.Ct. at 3460. The trial court was correct in refusing to explain the meaning of 'life imprisonment' to the jurors.
>
> This assignment is without merit.
>
> For these reasons the conviction should be affirmed."

STATE'S RESPONSE IN OPPOSITION TO
"THE FEDERAL QUESTIONS RAISED AND DECIDED BELOW"

The applicant contends in two parts that the Louisiana Supreme Court misconstrued California v. Ramos, supra, and the Eighth and Fourteenth Amendments to the U.S. Constitution. He claims that the alleged misconstruction permitted the jury to deliberate the death penalty "without accurate information concerning sentences other than death." He alleges that information about life imprisonment constitutes a "mitigating circumstance."

In California v. Ramos, this Honorable Court considered the constitutionality of a particular California jury instruction. At page 3458, the opinion states as follows:

> "In fact, advising jurors that a death verdict is theoretically modifiable, and this not 'final', may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.
>
> In short, an instruction disclosing the Governor's power to commute a death sentence may operate to the defendant's distinct disadvantage."

It is clear from this language that the courts are under no obligation to supply all accurate information in existence to a jury. As set forth in Ramos, at page 3459, the questions to ask regarding whether a trial court's instructions to a jury are constitutionally firm are as follows:

1. Do the instructions preclude individualized sentencing determinations?
2. Do the instructions preclude consideration of mitigating factors?
3. Do the instructions impermissibly inject an element too speculative for the jury's deliberation?

The Ramos opinion indicates that a failure to inform a jury of accurate information, such as a governor's ability to commute a death sentence as in Ramos, does not render an instruction constitutionally infirm. The opinion further indicates[1] that the decision to permit juror consideration of possible commutation is best left to the states, and that the Eighth and Fourteenth Amendments neither prohibit nor mandate such instructions. The opinion validates state court decisions holding improper jury instructions and argument informing juries of the possibility of commutation, pardon or parole. The Ramos opinion validates and quotes at page 3459 the Louisiana case of State v. Lindsey, 404 So.2d 466 (La. 1981), as follows:

> "Nowhere in the entire sentencing scheme does the [state code of criminal procedure] provide that the sentencing jury may consider the offender's future potential for release should a life sentence be imposed. . . . [G]iving a jury carte blanche permission

> to decide the potential factual consequences of a life sentence allows it to weigh the alternative not in terms of the clear meaning provided for it by the legislature, but in terms of a particular number of years versus the death penalty, thereby undermining the jury's responsibility to accept the law as given by the legislature through the court."

The Ramos conclusion as set forth in the "Syllabus" at page 3449, is as follows:

> "The conclusion that the Eighth and Fourteenth Amendments do not prohibit an instruction regarding a Governor's power to commute a life sentence, does not override the judgment of state legislatures that capital sentencing juries should not be permitted to consider such matter. The States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."

ARGUMENT OPPOSING THE APPLICANT'S ASSERTIONS THAT FEDERAL QUESTIONS ARE PRESENTED

During the sentencing deliberations and in response to the notes from the jury to the trial judge, the trial judge brought the jury before the court and readvised them of the factors which they could take into account in deciding the sentence. For the trial judge to have gone beyond the explanation as given would have been contra to well settled Louisiana jurisprudence. [3] The legal theory in Louisiana is that a jury should not be given the authority to decide potential factual consequences of a life sentence. Should a jury have this authority, the jury would then be allowed to weigh the alternative not in terms of the clear meaning provided for it

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3 State v. Brown, 414 So.2d 689 (La. 1982); State v. Willie, 410 So.2d 1019 (La. 1982); and State v. Lindsey, 404 So.2d 466 (La. 1981).

by the state legislature, but in terms of a certain number of years as opposed to death, thus undermining the jury's responsibility to accept the law as given by the legislature through the court.

Under the California v. Ramos decision, state courts are not mandated to supply all accurate information to a jury. California v. Ramos sets forth guidelines, supra, by which to view the state court's instructions. The penalty phase transcript in the instant case is replete with instances of individualized instructions, including instructions designed to encourage consideration of mitigating factors. For instance, at page 34 of Volume IV, the court instructed as follows:

> "You must consider the circumstances of the offense and the character and propensities of the defendant in determining the sentence to be imposed. . . You are required to consider the existence of aggravating and mitigating circumstances in deciding which sentence should be imposed. . . You will be furnished a list of the statutory aggravating and mitigating circumstances which you may take with you during deliberations. (Emphasis added)"

At page 36, the judge continued as follows:

> "Even if you find the existence of an alleged aggravating circumstance, you must also consider any mitigating circumstances before you decide that a sentence of death should be imposed.
>
> The law specifically provides certain mitigating circumstances. They are, "A", the offender has no significant prior history of criminal activity; "B", the offense was committed while the offender was under the influence of extreme mental or emotional disturbance; "C", the offense was committed while the offender was under the influence or under the domination of another person; "D", the offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct; "E", at the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication; "F", the youth of the offender at the time of the offense; and, "G", the offender was a principal whose participation was relatively minor.

> However, in addition to those specifically provided mitigating circumstances, you may also consider any other relevant mitigating circumstance. You are not limited only to those mitigating circumstances which are defined. You may consider any other relevant circumstances which you feel should mitigate the severity of the penalty to be imposed."

During the penalty phase, the defense was permitted full opportunity to put on evidence of mitigating factors, such as:

1. The defendant had two children and a common law wife, all of whom he treated well. The children loved him, and he took them to school and supported the whole family.
2. The common law wife testified that the defendant is not an "evil person".
3. The defendant's parents died when he was a child and he was raised by foster parents.

There was no attempt to preclude the jury from considering individualized and mitigating factors in their penalty phase deliberations. The applicant did not allege that the trial judge impermissibly injected speculative elements for the jury's deliberation, and certainly the judge did not do so. Thus the trial judge's instructions to the jury are in compliance with the California v. Ramos guidelines.

Advising a jury concerning life imprisonment is not a mitigating factor as contemplated by the California v. Ramos decision. Such information is additionally not a mitigating factor as contemplated by Lockett v. Ohio, 438 U.S. 586 (1978).

CONCLUSION

There is nothing in the Ramos, supra, decision to mandate advice to a jury as to the length of "life imprisonment." Mitigating factors were presented during the penalty phase, and every attempt was made by the court to insure individualized sentencing. For these reasons, the undersigned counsel respectfully urges this Honorable Court to deny the application for Writ of Certiorari.

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